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# Boundaries--Conflict Between Courses and Distances

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## BOUNDARIES—CONFLICT BETWEEN COURSES AND DISTANCES

A number of interesting problems in the construction of deeds are presented where the description of property is by metes and bounds and the descriptive elements are conflicting.<sup>1</sup> Certain rules of construction have been developed. These rules have been summarized by Tiffany,<sup>2</sup> and for our purpose may be stated as follows:

1. Fixed and known monuments prevail over courses, distances, and contents.
2. When the courses and distances conflict, neither is preferred but the whole description is considered to determine which conforms to the intention of the parties.
3. Description by metes and bounds prevails over general description.
4. Area is the weakest indication of intent.

The second of these rules has presented some difficulty.<sup>3</sup> If the rules are rigidly followed, what is the outcome when courses and distances conflict and there is no data by which to determine which was intended to control?

The courts generally seem to favor course over distance in such a case. One of the leading authorities for this result is *Ewart v. Squire*,<sup>4</sup> where the court, in listing the "guides" in order of importance, placed course over distance. The court said: "But the rule is flexible, and it does not control against the intention of the parties as shown by the description taken as a whole."<sup>5</sup> One of the few rationalizations for this preference is given in *Colvin v. Fell*, where the court said: "But the presumption would seem to be rather in favor of the course than of the distance, as chain men are more liable to inaccuracy in measurement than the surveyor in the course."<sup>6</sup> The only other rationalization found by this writer, if it may be called that, is the statement in *Beckley v. Bryan and Ransdale* that "reason as well as law seems to suggest that the distances, taken in our mode of mensuration, ought to yield, as being much the most uncertain of the two."<sup>7</sup> Though not stated categorically, another reason over and above the preference for the work of the surveyor over that of chain men, probably in the purview of the court, is the difficulty in exactly measuring distances over terrain

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<sup>1</sup> States vary in their concern with this problem, as descriptions in the majority of deeds in some states are by references to plat or U.S. Land Survey. In Kentucky, however, a very great proportion of the descriptions in deeds are by metes and bounds. Cases are innumerable where the lines have run, from time immemorial. "South 154 poles to a poplar tree, East 74 poles to an oak," etc., and where poplar and oak have long since disappeared.

<sup>2</sup> For a more complete statement of such rules, see TIFFANY, A TREATISE ON THE MODERN LAW OF REAL PROPERTY, Sec. 673 (Abridged ed. 1940).

<sup>3</sup> See 7 Fifth Dec. Digest, Boundaries 3 (5).

<sup>4</sup> 239 Fed. 34 (1916). *Accord*: U.S. v. State Investment Co., 264 U.S. 206, 68 L. Ed. 639, 44 Sup. Ct. 289 (1923); Tice v. Winchester, 225 N. C. 673, 36 S.E. 2d 257 (1945).

<sup>5</sup> 239 Fed. 34, 36 (1916).

<sup>6</sup> 40 Ill. 418, 425 (1866).

<sup>7</sup> Sneed 91, 93 (Ky. 1801).

which is not level in comparison to the simplicity of sighting a course by compass. There is also an indication that courts believe some surveyors are lax, in that they locate three corners, sight courses from the first and third corners, and estimate the distance of the two lines to their intersection.

Probably the first case where the Kentucky Court of Appeals was faced with this problem was that of *Beckley v. Bryan and Ransdale*.<sup>8</sup> The court in that case preferred course over distance, there being an absence of any circumstance which would indicate which was in error. This was subsequently followed as a general proposition.<sup>9</sup> Shortly thereafter the court began to find "exceptions" to the rule. It found so many that it was subsequently said of the general rule that "it has been departed from about as frequently as it has been followed."<sup>10</sup> This statement, however, is not true in a numerical sense, even with a liberal construction of the word "exception." It is believed that there are few exceptions to the rule, when properly applied; and that what have been frequently spoken of as exceptions are, in most instances, fact situations where the need for the rule does not arise.

First, it may help to place the rule in its proper setting, as established by cases decided by the authorities. "The intention of the parties, as inferred from the terms and descriptions controls, and any rules concerning the relative importance of the various elements of the description are merely aids in arriving at this intention."<sup>11</sup> Natural and permanent objects are the most satisfactory evidence of this intention and control all other means of description.<sup>12</sup> Artificial marks are next in importance in determining the intent of the parties.<sup>13</sup> This is followed by courses and distances.<sup>14</sup> Last of all comes area.<sup>15</sup> Where courses and distances, when followed, do not close the survey—i.e., where there is error in one—in the absence of any facts indicating where the error lies, the courses must be run, lengthening or shortening the distance, as each case may require, and in proportion to the length of each lost line, to close the survey. If the survey cannot be made to close by this means, then, "and not otherwise, a deviation from the courses called for must also aid in accomplishing the purpose."<sup>16</sup>

<sup>8</sup> *Ibid.*

<sup>9</sup> *Bryan v. Beckley*, Litt. Sel. Cas. 91 (Ky. 1809); *Pearson v. Baker*, 4 Dana 321 (Ky. 1836); *Kerr v. DeLaney*, 28 Ky. L. Rep. 1140, 91 S.W. 286 (1906); *Chambers v. Thorp*, 29 Ky. L. Rep. 271, 93 S.W. 627 (1906); *Morgan v. Renfro*, 124 Ky. 314, 99 S.W. 311 (1907); *Brashears v. Joseph*, 32 Ky. L. Rep. 1139, 108 S.W. 307 (1908); *Combs v. Valentine*, 144 Ky. 184, 137 S.W. 1080 (1911); *Rock Creek Property Co. v. Hill*, 162 Ky. 324, 172 S.W. 671 (1915); *Fidelity Realty Co. v. Flahaven Land Co.*, 193 Ky. 355, 236 S.W. 260 (1922); *Fordson Coal Co. v. Spurlock*, 19 F. 2d 820 (1927); *Louisville Cooperage Co. v. Collins*, 228 Ky. 266, 14 S.W. 2d 1090 (1929); *Metropolitan Life Ins. Co. v. Hoskins*, 273 Ky. 563, 117 S.W. 2d 180 (1937).

<sup>10</sup> *Contra*: *The Poplar Mountain Coal Co. v. Dick*, 7 Ky. Opin. 420, 424 (1874), where it was said: "But there is no reason why the courses should prevail over the distances called for. The distances called for limit the extent of the line, unless it be extended to reach a natural object called for." This case was not subsequently followed, as the next three cases in point reverted to the general rule.

<sup>11</sup> *Cornett v. Kentucky River Coal Co.*, 175 Ky. 718, 727, 195 S.W. 149, 153 (1917).

<sup>12</sup> *Tiffany A Treatise on the Modern Law of Real Property*, Sec. 673 (Abridged ed. 1940).

<sup>13</sup> See *Metropolitan Life Ins. Co. v. Hoskins*, 273 Ky. 563, 117 S.W. 2d 180 (1937).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> See *Morgan v. Renfro*, 124 Ky. 314, 99 S.W. 311 (1907).

The cases which purport to raise exceptions must be considered against this background. *Preston s Heirs v. Bowmar*<sup>17</sup> is a case frequently cited as an exception. The Kentucky Court of Appeals there held that the mode of closing the survey which operates most unfavorably to the party claiming under it must be adopted. This resulted in a ruling favoring distance over course. On appeal,<sup>18</sup> however, the U. S. Supreme Court treated this case as one in which the intention of the parties could be determined upon a minute examination of the circumstances. This alleviated the necessity of applying the rule.

Another situation is found in *Calvert v. Fitzgerald*,<sup>19</sup> where, if the courses were followed, the distance would have been far extended. This might be considered as a circumstance indicating intention, but it would probably be better to regard this as a true exception. It does not detract from the rule, but makes it certain that injustice will be avoided in a strict application of the rule, where both are considered together in a determination of the case.

Several cases are cited as exceptions to the rule which state that the rule will not be followed where it appears from the facts (or circumstances, or plat and certificate of survey) that the course is mistaken.<sup>20</sup> This can hardly be regarded as an exception. The rule arises only when the intention of the parties cannot be ascertained from the circumstances of the case.

Another case, said to be an exception to the rule, holds that the course must yield where it is evident from the calls of the deed that distance is the material and controlling factor.<sup>21</sup> Stated thus, this would seem to be another situation in which the rule does not apply. But this brings to mind the possibility of cases involving small plats of land in urban areas. Though the circumstances might not indicate that the distances are the material and controlling factor, on such small plots they would almost necessarily be so. To avoid the advent of a borderline case in this direction, it might be wiser to consider this an exception, to be kept under the surveillance of the general rule.

One case purported to summarize the exceptions to the general rule.<sup>22</sup> The only doctrine there discussed, with which we have not yet dealt, is that course should yield to distance where by following the course a figure is produced that does not correspond with the original survey and plat upon which the patent is issued. It would seem the best course not to refer to this as an exception. The original survey and plat may always be considered as evidence tending to show that there is a mistake in the course, which would alleviate the necessity of applying this rule. If it does not show such a mistake, then the rule should be followed, there being insufficient proof that the land conveyed was to be the same as such original survey and plat.

There remains to be considered the opinion of the court in *Farmers' National Bank of Somerset v. Bolton*.<sup>23</sup> In giving directions to the lower court as to the

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<sup>17</sup> 2 Bibb, 493 (Ky. 1811).

<sup>18</sup> 6 Wheat 580, (U.S. 1821).

<sup>19</sup> Litt. Sel. Cas. 388 (Ky. 1912).

<sup>20</sup> *Steele's Heirs v. Taylor*, 3 A. K. Marsh. 225 (Ky. 1821); *Croghan's Lessee v. Nelson*, 44 U.S. 187 11 L. Ed. 554 (1845); *May v. Wolf Valley Coal Co.*, 167 Ky. 525, 180 S.W. 781 (1915).

<sup>21</sup> *Blight v. Atwell*, 4 J. J. Mar. 278 (1830).

<sup>22</sup> *Supra*, note 10.

<sup>23</sup> 265 Ky. 586, 97 S.W. 2d 406 (1935).

correct instructions to the jury, the following statement was made: "The court will also instruct the jury that courses and distances must yield to natural objects proven and established by the evidence, and where courses and distances are not in harmony, *courses must yield to distances.*" (*Italics authors*) In support of this statement, the court cited two cases. The first of these, *Lindsay v. Latham*,<sup>24</sup> contains merely a statement of the rule of construction that courses and distances must yield to natural objects when there is a conflict. The second case cited, *Loussville Cooperage Co. v. Collins*,<sup>25</sup> which evidently was cited to support the latter part of his model instruction, also involves a model instruction as to courses and distances in the case of conflict: "The court instructs the jury that in the absence of any facts tending to a contrary conclusion distance yields to course, and the distances must be shortened or extended in proportion to the length of each line as the case may require, to make the survey close"<sup>26</sup> In view of the entire absence of rationalization in the *Bolton* case, the opinion there must be regarded as a mistake.

It is submitted that only two exceptions can be made to the rule where the fact situation appears to be such that it would otherwise apply:

- (1) The rule should not be applied if its application would result in the distances being greatly extended or contracted.
- (2) The rule should not be applied where it appears that distance is the material and controlling object, and courses are merely an adjunct to complete the description.

When thus applied, the rule retains its value in construing conveyances where it appears that the boundaries must be fixed according to the metes and bounds, and the courses and distances, when run, do not close the survey, and there are no circumstances showing which should be preferred. The reasons for this preference are sound, and there are no reasons which would support a contrary rule. The application of the rule avoids an attempt to secure a decision based on the sympathy of the court rather than on sound law. It gives certainty where there is none without it. Although it fills only a small place in the law of conveyancing, it fills a definite need which is shown by the considerable number of cases raising this point.

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<sup>24</sup> 32 Ky. L. Rep. 867, 107 S.W. 267 (1908).

<sup>25</sup> 228 Ky. 266, 14 S.W. 2d 1090 (1929).

<sup>26</sup> *Id.*, at 270, 14 S.W. 2d at 1092.